

**MAY 18 2006**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

DANNY BARNES,

Plaintiff - Appellant,

v.

SPINCYCLE, LLC, also known as  
Spincycle, Inc., erroneously sued as  
SpinCycle, LLC,

Defendant - Appellee.

No. 05-55925

D.C. No. CV-03-00184-TJH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Terry J. Hatter, Chief Judge, Presiding

Submitted May 15, 2006<sup>\*\*</sup>

Before: B. FLETCHER, TROTT, and CALLAHAN, Circuit Judges.

Danny Barnes appeals pro se from the district court's judgment dismissing his employment discrimination action pursuant to Federal Rule of Civil Procedure

---

<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

37(b)(2) for failure to attend a pretrial conference. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing for abuse of discretion, *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc.*, 857 F.2d 600, 603 (9th Cir. 1988), we reverse, and remand for further proceedings.

A district court must consider the following five factors in determining whether to dismiss a case as a punitive measure: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Id.* (quoting *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987)). If the district court does not make explicit findings regarding these factors, this court reviews the record independently to determine whether the sanction was an abuse of discretion. *Id.*

Here, the harsh penalty of dismissal was not warranted. Barnes’ failure to appear at the pretrial conference did not cause undue delay or render the case unmanageable. *See id.* at 605. Moreover, Spincycle suffered no prejudice beyond the expense of preparing for and attending the pretrial conference. *See id.* Most important, the district court failed to warn Barnes of the possibility of dismissal

and to consider less drastic sanctions. *See id.* Under these circumstances, the district court abused its discretion in dismissing the action. *See id.*

We do not address Barnes' contentions regarding the district court's interlocutory rulings or the merits of his claims because the district court dismissed his action for failure to comply with a court order, and did not reach the merits of his claims. *See Al-Torki v. Kaempfen*, 78 F.3d 1381, 1385 (9th Cir. 1996).

**REVERSED and REMANDED.**